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HOFFMAN PLASTIC COMPOUNDS v. NLRB: AN INVITATION TO EXPLOIT

INTRODUCTION

The Department of Labor enforces approximately 180 federal statutes that promote the welfare of 125 million workers.[1] However, the American workforce includes millions of people whose immigration status does not entitle them to work.[2] Many of these undocumented workers earn far less than the minimum wage and work in substandard conditions.[3] Additionally, many of these workers are afraid that if they dare to assert their rights, they will be deported.[4] Do federal laws that protect the American workforce apply to undocumented workers? What are the liabilities of employers who exploit such workers? A recent Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB*,[5] leaves these questions unanswered and raises important considerations concerning the workplace rights of both undocumented and legally employed

1. *See* Department of Labor, *Summary of the Major Laws of the Department of Labor*, *at* http://www.dol.gov/opa/aboutdol/lawsprog.htm (last visited May 26, 2003). *See generally* ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 1 (13th ed. 2001).

2. An estimated eight to nine million illegal aliens live in the United States. *U.S. Population and Immigration: Hearing Before the House Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. 7 (2001) (statement of Jeffrey S. Passel, Principal Research Associate, Population Studies Center, The Urban Institute). The term "undocumented worker" refers to a person whose immigration status prohibits employment. *Id.*

3. *See* Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (discussing undocumented workers' willingness to work for less than the minimum wage); *see also* Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 633 (2000) (noting that undocumented workers earn an average of two dollars per hour, working ten hours a day[] and six days a week); Neil A. Friedman, Comment, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CAL. L. REV. 1715, 1715 (1986) (noting that undocumented workers are "disproportionately paid substandard wages").

4. A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 414 (1995), *enforced* 134 F.3d 50 (2d Cir. 1997) ("[U]ndocumented aliens are extremely reluctant to complain . . . for fear that they will lose their jobs or risk detection and ultimately deportation by the INS."); *see also* Brief of Amici Curiae National Employment Law Project et al. at 13, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (discussing specific employer threats to report employees to the INS for asserting various legal rights); Irene Zopoth Hudson & Susan Schenck, Note, *America: Land of Opportunity or Exploitation?*, 19 HOFSTRA LAB. & EMP. L.J. 351, 356 (2002) (stating that undocumented workers are unlikely to report employers' illegal behavior for fear of deportation).

5. 535 U.S. 137 (2002).

workers.[6] This Comment will discuss the impact that *Hoffman Plastic Compounds, Inc.* may have if interpreted narrowly and the likelihood that courts will apply it in other contexts.

Part I of this Comment will provide a chronological summary of the statutory and case law history that preceded the Supreme Court's decision in *Hoffman Plastic Compounds, Inc.*[7] Part II will discuss the Supreme Court's decision in *Hoffman Plastic Compounds, Inc.*, including a discussion of the prior history of the case.[8] Part III will explore whether the Court's ruling applies to employers who knowingly hire undocumented workers.[9] Finally, Part IV will discuss the application of *Hoffman Plastic Compounds, Inc.* under two other important worker protection laws: the Fair Labor Standards Act[10] ("FLSA") and Title VII of the Civil Rights Act of 1964[11] ("Title VII").[12] This Comment will conclude that the Supreme Court's decision in *Hoffman Plastic Compounds, Inc.* is inconsistent with both labor and immigration policy.[13] Therefore, courts should interpret the decision narrowly to limit its potential for harm in the American workplace.[14]

I. BACKGROUND

A. Discriminatory Discharge Under the NLRA

Section 8(a)(3) of the National Labor Relations Act ("NLRA")[15] prohibits "discrimination in regard to . . . tenure of employment . . . to encourage or discourage membership in any labor organization."[16] The National Labor Relations Board ("NLRB") is the agency that

6. *See id.*
7. *See* discussion *infra* Part I.
8. *See* discussion *infra* Part II.
9. *See* discussion *infra* Part III.
10. 29 U.S.C. §§ 201-219 (2000).
11. 42 U.S.C. §§ 2000e to 2000e-17 (2000).
12. *See* discussion *infra* Part IV.
13. *See* discussion *infra* Conclusion.
14. *See* discussion *infra* Conclusion.
15. 29 U.S.C. §§ 151 to 169 (2000).
16. Section 8(a)(3) (codified at 29 U.S.C. § 158(a)(3) (2000)).

administers the NLRA.[17] The NLRB's typical remedy for a discriminatory discharge includes reinstatement of the worker to his former position and reimbursement for the amount that the worker would have earned during the period between the unlawful discharge and the reinstatement.[18] Scholars refer to this reimbursement as "back pay."[19] The period between an unlawful discharge and reinstatement is the "back pay period."[20]

B. Sure-Tan, Inc. v. NLRB*: Back Pay Predicated on Legal Presence*

The Supreme Court addressed the availability of back pay for an undocumented worker under the NLRA in *Sure-Tan, Inc. v. NLRB*,[21] but circuit courts have disagreed about the scope of the Supreme Court's holding.[22] In *Sure-Tan, Inc.*, an employer reported to the Immigration and Naturalization Service ("INS") the presence of illegal aliens in his plant to retaliate against workers who voted to unionize.[23] The INS arrested five undocumented employees but allowed them to leave the country "voluntar[il]y" as a substitute for deportation.[24] The employer's call to the INS constituted a constructive discharge in violation of section 8(a)(3).[25]

The administrative law judge recommended that the NLRB order Sure-Tan, Inc. to offer reinstatement to the workers and to hold the offers open for six months, because the employees were out of the country.[26] The administrative law judge further suggested that the NLRB award the workers back pay for a minimum four-week period to deter Sure-Tan, Inc. from violating the NLRA in the future and to

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17. 29 U.S.C. § 153.

18. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1788-89 (1983).

19. COX ET AL., *supra* note 1, at 253 (discussing Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)).

20. *Id.*

21. 467 U.S. 883 (1984).

22. *See* discussion *infra* Part I.E-F.

23. *Sure-Tan, Inc.*, 467 U.S. at 886-87.

24. *Id.* at 887.

25. *Id.* at 888.

26. Sure-Tan, Inc., 234 N.L.R.B. 1187, 1192 (1978). A violation of section 8 is an "unfair labor practice." 29 U.S.C. § 158 (2000).

compensate the unlawfully discharged workers.[27] The NLRB postponed awarding back pay until the compliance hearing because the record did not specify when the employees would be able to legally reenter the country, rendering any award "unnecessarily speculative."[28] On appeal, the Seventh Circuit Court of Appeals modified the NLRB order.[29] The court of appeals required the employer to hold the offers open for four years to give the employees adequate time to obtain INS permission to reenter the country and reclaim their jobs.[30] Further, the court modified the award to include a six-month back pay award "for purposes of effectuating the policies of the [NLRA]."[31] The NLRB subsequently adopted the appellate court's suggested award.[32] The Supreme Court granted Sure-Tan, Inc.'s petition for certiorari to determine whether the NLRB properly awarded back pay to illegal aliens.[33]

The Supreme Court began its analysis by determining that undocumented workers were "employee[s]" within the meaning of the NLRA.[34] However, the Court prohibited the NLRB from awarding back pay "during any period when [the workers] were not lawfully entitled to be present and employed in the United States."[35] The Court reasoned that this holding was consistent with immigration policy because it conditioned NLRA remedies upon legal readmittance into the United States and discouraged illegal reentry into the United States for reinstatement.[36]

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27. *Sure-Tan, Inc.*, 234 N.L.R.B. at 1193.

28. *Id.* at 1187.

29. NLRB v. Sure-Tan, Inc., 672 F.2d 592, 606 (7th Cir. 1982).

30. *Id.*

31. *Id.* The court intended the six-month period to be an approximation of the time the workers would have kept their jobs had the employer not unlawfully discharged them. *Id.* On appeal, the Supreme Court held that the NLRB did not have the power to grant an award that was not based on the employees' actual economic loss. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904-05 (1984).

32. *Sure-Tan, Inc.*, 467 U.S. at 890.

33. *See id.* at 886.

34. *Id.* at 892.

35. *Id.* at 903. The employment of undocumented workers was not illegal at the time that the Court decided *Sure-Tan, Inc. Id.* at 892-93. Conversely, *Hoffman Plastic Compounds, Inc.* was decided in a "legal landscape . . . significantly changed" by the intervening changes to immigration law prohibiting the employment of undocumented workers. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002); *see also* discussion *infra* Part I.D.

36. *Sure-Tan, Inc.*, 467 U.S. at 903.

In his dissent, Justice Brennan criticized the majority on several grounds.[37] First, he asserted that the Court should have approached the case with the level of deference usually afforded to administrative agencies, because the NLRB had adopted the court of appeals' suggested award as its own.[38] Second, Justice Brennan criticized the majority decision as internally inconsistent.[39] The majority simultaneously held that undocumented workers (1) were "employees" within the meaning of the NLRA despite their illegal presence during employment and (2) could not receive back pay, the only NLRA remedy that had any effective deterrent value, because they were not legally present after the illegal discharge.[40] Justice Brennan stated that the "[t]he contradiction in the Court's opinion [was] total": the workers were protected as "employees" but "stripped of the normal remedial protections of the Act."[41]

C. Local 512, Warehouse and Office Workers' Union v. NLRB[42] ("Felbro"): *The Ninth Circuit's Narrow Interpretation of* Sure-Tan, Inc.

Two years after the Supreme Court's decision in *Sure-Tan, Inc.*, the Ninth Circuit Court of Appeals, in *Felbro*, held that the NLRB may award back pay to an undocumented worker who remains in the United States during the back pay period.[43] In *Felbro*,[44] an employer violated section 8(a)(3) by discharging several workers for their union activities.[45] Although the administrative law judge had awarded the undocumented workers back pay, the NLRB determined

37. *Id.* at 906-13 (Brennan, J., concurring in part and dissenting in part).

38. *Id.* at 906-07 (Brennan, J., concurring in part and dissenting in part). Justice Brennan noted that the NLRB had a long-standing policy of "forgiving periods of unavailability that are due to the employer's own illegal conduct." *Id.* at 910. This policy was applicable because the workers were unavailable due to the employer's illegal constructive discharge. *Id.*

39. *Id.* at 911 (Brennan, J., concurring in part and dissenting in part).

40. *Id.* at 41.

42. 795 F.2d 705 (9th Cir. 1986).

43. *Id.* at 717.

44. *Felbro* refers to the NLRB decision and *Local 512* refers to the Ninth Circuit Court of Appeals decision.

45. Felbro, Inc., 274 N.L.R.B. 1268, 1283 (1985).

that the Supreme Court's intervening decision in *Sure-Tan, Inc.* precluded the NLRB from issuing a back pay award to undocumented workers.[46] The Ninth Circuit Court of Appeals reversed the remedy portion of the NLRB order with respect to back pay.[47] The court distinguished *Sure-Tan, Inc.* because in that case the workers' departure to Mexico had made them unavailable to work for an indefinite period and any back pay award would consequently have been speculative.[48] Conversely, the employees in *Felbro* remained in the United States.[49] After finding that *Sure-Tan, Inc.* was not controlling, the court awarded back pay to the workers, relying on decisions pre-dating *Sure-Tan, Inc.*[50] Prior to the Supreme Court's decision in *Hoffman Plastic Compounds, Inc.*, the NLRB followed the Ninth Circuit Court of Appeals' reasoning and consistently awarded back pay to remedy section 8(a)(3) violations of undocumented workers who remain in the United States during the back pay period.[51]

D. The Immigration Reform and Control Act: Congress Sanctions the Employment of Undocumented Workers

The Immigration and Naturalization Act ("INA")[52] did not prohibit the employment of undocumented workers until Congress amended it by passing the Immigration Reform and Control Act of 1986 ("IRCA"),[53] two years after the Supreme Court decided *Sure-Tan, Inc.*[54] The IRCA prohibits the employment of undocumented workers

46. *See id.* at 1269.
47. *Local 512*, 795 F.2d at 722.
48. *Id.* at 717.
49. *Id.*
50. *See id.* For example, the court relied on *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979), to support its holding that undocumented workers deserve back pay for unlawful discharges under the NLRA. *See id.* at 717-18.
51. *See, e.g.*, A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 415 (1995); Del Rey Tortilleria, Inc., 302 N.L.R.B. 216, 220 (1991); *see also* discussion *infra* Part IV.F.
52. 8 U.S.C. §§ 1101 to 1525 (2000).
53. *Id.* § 1324a.
54. Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

workers and provides both civil[55] and criminal[56] penalties for employers who knowingly hire undocumented workers.[57]

Congress intended IRCA's employer sanctions to deter illegal immigration by complementing the enforcement of wage and hour laws of the Fair Labor Standards Act ("FLSA") with respect to undocumented workers.[58] Congress believed that uniform enforcement of worker protection laws with respect to undocumented and legal workers alike would remove the economic incentive for employers to hire undocumented workers over legally authorized workers.[59] The IRCA's passage was a response to Congress' perception that programs intended to deter illegal immigration, by targeting the employers of undocumented workers, were not sufficiently effective and that sanctions would provide additional deterrence.[60] The IRCA's legislative history indicates that Congress intended employer sanctions to complement, rather than replace, enforcement of worker protection laws.[61]

E. Del Rey Tortilleria, Inc. v. NLRB*: The Seventh Circuit Prohibits Back Pay Until Proof of Authorization to Work*

In 1992, the Seventh Circuit Court of Appeals, in *Del Rey Tortilleria, Inc. v. NLRB*,[62] also addressed whether *Sure-Tan, Inc.* precluded the NLRB from awarding back pay where undocumented workers remained in the United States after their unlawful

55. 8 U.S.C. § 1324a(e)(4)(A) (2000).

56. *Id.* § 1324a(f)(1).

57. *Id.* § 1324a(a)(1)(A). Congress intended the IRCA to deter illegal immigration by imposing sanctions on employers for hiring undocumented workers. H.R. REP. NO. 99-682, pt. 1, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650. The Report of the Judiciary Committee states: "This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions." *Id.*

58. Richard E. Blum, Note, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers After* Sure-Tan, *The IRCA, and* Patel, 63 N.Y.U. L. REV. 1342, 1360 (1988).

59. *See id.* at 1374.

60. *See id.* at 1362-67.

61. *See* H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662 ("It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law . . . .").

62. 976 F.2d 1115 (7th Cir. 1992).

discharge.[63] The court concluded that an undocumented worker who remains in the United States after an unlawful discharge may not receive back pay for his employer's NLRA violation until he demonstrates that he was legally present and entitled to work.[64] Because NLRA back pay was a remedial measure, the court reasoned that the worker had not suffered any compensable harm unless he could show that he was legally employable during the back pay period.[65] The court interpreted *Sure-Tan, Inc.* to prohibit undocumented workers from receiving back pay before showing proof of legal employment status.[66]

Although the court decided *Del Rey Tortilleria, Inc.* after the IRCA's passage, the illegality of employing undocumented workers was not a factor in the court's decision to preclude back pay because Del Ray Tortilleria, Inc. hired the workers prior to the IRCA's passage.[67] The court acknowledged that the IRCA did not control the rights of the parties[68] but noted in dicta that the IRCA would preclude back pay for undocumented workers discharged in violation of the NLRA.[69]

F. NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.: *The Second Circuit Allows Back Pay Pending Authorization for a Reasonable Time*

In 1997, the Second Circuit Court of Appeals, in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*,[70] enforced an NLRB order that represented a new NLRB policy regarding the availability of back

63. *See id.*
64. *Id.* at 1123.
65. *Id.* at 1119.
66. *Id.* at 1120.
67. *See* Del Rey Tortilleria, Inc., 302 N.L.R.B. 216, 220 (1991).
68. *Del Rey Tortilleria*, 976 F.2d at 1121 n.6.
69. *Id.* at 1122. The court based this conclusion on the illegality of the employment relationship under the IRCA. *Id.* The court distinguished the impact that the IRCA would have on the availability of back pay under the FLSA by noting that the FLSA damages remedy violations for work already performed. *Id.* at n.7. The court also stated that remedies under Title VII are distinguishable but declined to discuss the matter. *Id.*
70. 134 F.3d 50 (2d Cir. 1997).

pay to undocumented workers.[71] In *A.P.R.A. Fuel Oil Buyers Group, Inc.*, an employer violated the IRCA by hiring employees who it knew were undocumented and then violated NLRA section 8(a)(3) by firing the undocumented workers after they supported a union.[72] The NLRB ordered reinstatement contingent upon the workers' successful application for green cards.[73] The NLRB tailored its back pay award so that it would not conflict with the IRCA by awarding back pay for the period between the unlawful discharge and the conditional reinstatement, or for a reasonable time after the discharge if the workers did not obtain authorization to work.[74] The Second Circuit Court of Appeals held that the IRCA's passage did not diminish the availability of NLRA remedies.[75] The court relied in part on Congress' statements that it intended the IRCA to deter employers from hiring undocumented workers.[76] Consequently, Congress did not intend to diminish labor protections then available.[77]

The Supreme Court decided *Hoffman Plastic Compounds, Inc.* against the background of a circuit court split over the availability of back pay to undocumented workers.[78] The Second Circuit Court of Appeals would enforce a back pay award *before* a worker had provided documentation, whereas the Seventh Circuit Court of Appeals would deny back pay *until* the worker met this requirement.[79]

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71. *See id.* at 52-53.

72. A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 409 (1995); *see also A.P.R.A.*, 134 F.3d at 52-53.

73. *A.P.R.A.*, 134 F.3d at 53.

74. *Id.* at 57.

75. *Id.* at 56.

76. *Id.* at 55-56 (discussing H.R. REP. NO. 99-682, pt. 1, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650).

77. *See id.* at 56 (noting that the NLRB had similarly relied on Congressional statements found in H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650).

78. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 537 U.S. 137 (2002) (discussing the rationale of previous cases as related to the Court's decision).

79. *See* John R. McIntyre, *What Does "Lawfully Entitled to be Present and Employed" Mean to You?: Undocumented Workers & Make-Whole Remedies Under the NLRA*, 22 U. HAW. L. REV. 737, 753 n.125 (2000).

G. The After-Acquired Evidence Rule: Balancing Competing Objectives by Providing a Limited Remedy

The Supreme Court's discussion of the after-acquired evidence rule in *McKennon v. Nashville Banner Publishing Co.*[80] explains the rationale behind the NLRB's limited remedy order in *Hoffman Plastic Compounds, Inc.*[81] The after-acquired evidence rule provides an employer who violates a federal law that prohibits discriminatory discharge with a partial defense if he learns, after the unlawful discharge, that the employee had engaged in misconduct that would have justified termination.[82] Where an employer can show that it would have justifiably discharged the employee had it known of the misconduct, the after-acquired evidence rule provides that the back pay period will run from the date of the unlawful discharge until the time that the employer learned of the misconduct.[83] In the context of a discharge that violates NLRA section 8(a)(3), the after-acquired evidence rule balances the NLRB's "responsibility to remedy the [employer's] unfair labor practice against the public interest in not condoning [the employee's misconduct]."[84] Thus, the after-acquired evidence rule does not provide a defense to liability for the employer's violation but may reduce the employee's remedy.[85]

The Supreme Court endorsed the after-acquired evidence rule in *McKennon*, a case involving a discharge that violated the Age Discrimination in Employment Act of 1967[86] ("ADEA").[87] In *McKennon*, an employer violated the ADEA by firing a 62-year-old employee because of her age.[88] However, the employee admitted in a

80. 513 U.S. 352 (1995).

81. *Id.* at 360-63.

82. Brief for the National Labor Relations Board at *8, Hoffman Plastic Compounds, Inc. v. NLRB, 537 U.S. 137 (2002) (No. 00-1595); *see also* John Cuneo, Inc., 298 N.L.R.B. 856, 856-57 (1990) (holding that the after-acquired evidence rule applied where an employer learned after the unlawful discharge that its employee had previously misstated his employment history to obtain employment).

83. *See* Brief for the National Labor Relations Board at *8, *Hoffman Plastic Compounds, Inc.*, 537 U.S. 137 (No. 00-1595) (explaining after-acquired evidence rule).

84. *John Cuneo, Inc.*, 298 N.L.R.B. at 856.

85. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360-62 (1995).

86. 29 U.S.C. §§ 621 to 634 (2000).

87. *McKennon*, 513 U.S. 352.

88. *Id.* at 356.

pre-trial deposition that she had copied the company's confidential financial records.[89] The company claimed that it would have justifiably fired her had it known of that misconduct.[90]

The Court analyzed the issue of back pay availability in terms of the effect that the employee's conduct would have on her remedy, rather than the employer's liability.[91] The Court balanced the goal of deterring the employer's discriminatory conduct against the "equities that [the employer] ha[d] arising from the employee's wrongdoing."[92] The Court held that back pay is available to effectuate the ADEA's public purpose in eliminating employment discrimination, but it is limited to account for the employee's misconduct.[93] The employer can terminate back pay when the employer can show that it would have justifiably terminated the employee because it learned of the employee's wrongdoing.[94] In *McKennon*, the back pay would run from the unlawful discharge until the deposition when the employer learned of the employee's wrongdoing.[95]

II. *HOFFMAN PLASTIC COMPOUNDS, INC.*

In *Hoffman Plastic Compounds, Inc.*, the Supreme Court addressed the issue of whether the NLRB may award back pay to an undocumented worker who falsified immigration documents to obtain employment.[96] The employer, Hoffman Plastic Compounds, Inc. ("Hoffman"), violated section 8(a)(3) of the NLRA by firing Jose Castro ("Castro") "'in order to rid itself of known union supporters.'"[97] To remedy the unlawful discharge, the NLRB ordered Hoffman to (1) "cease and desist" violating the NLRA, (2) reinstate Castro, (3) provide back pay, and (4) post a notice at work regarding

89. *Id.* at 355.
90. *Id.*
91. *Id.* at 360. ("[W]e must consider how the after-acquired evidence of the employee's wrongdoing bears on the specific remedy to be ordered.").
92. *Id.* at 361.
93. *McKennon*, 513 U.S. at 362.
94. *Id.*
95. *Id.*
96. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).
97. *Id.*

the order.[98] An administrative law judge was to determine the back pay amount at a later compliance hearing.[99]

When Castro later admitted that he had obtained his job by falsifying documentation required under immigration law, the administrative law judge decided that the NLRB could not order back pay because such an award would conflict with the IRCA, which prohibited the employment of undocumented workers.[100] The NLRB reversed this decision on appeal.[101] The Supreme Court granted certiorari after the Circuit Court of Appeals for the District of Columbia denied the company's petition for review of the NLRB order.[102] The courts and the NLRB agreed that Hoffman had violated the NLRA.[103] The Supreme Court granted certiorari to determine the availability of back pay to remedy that violation.[104]

A. The Court's Two Bases

Writing for the majority, Chief Justice Rehnquist held that the NLRB could not award an undocumented worker back pay to remedy an unlawful discharge.[105] The Court reasoned that back pay would conflict with the IRCA by (1) reimbursing a worker for work that the IRCA prohibited him from performing[106] and (2) rewarding him for having obtained a job by "criminal fraud."[107] Therefore, the Court's analysis rested on two bases. First, the employee had no legal right to employment during the period for which back pay would compensate

98. *Id.* at 140-41.

99. *Id.* The NLRB usually holds a compliance hearing after issuing an order to determine the amount of back pay. *See* 29 C.F.R. § 102.54(a) (2002).

100. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 141.

101. *Id.* The NLRB cited *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 415 (1995), to support its position that the uniform application of NLRA remedies to legally authorized and undocumented workers alike best supports immigration policy. *Id.*; *see* discussion *infra* Part II.D.

102. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 142.

103. *Id.* at 153 (Breyer, J., dissenting).

104. *See id.* at 140.

105. *Id.* at 151-52 (holding that other remedies, such as a cease and desist order, are available to undocumented workers under the NLRA).

106. *Id.* at 149. An undocumented worker cannot legally obtain work during the back pay period. *See* Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2000).

107. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 149.

him.[108] Second, the NLRB could not compensate an employee who had obtained his job by violating the IRCA.[109] The Court determined that the employee was not entitled to *any* back pay and that the NLRB could not grant an award, even if limited by the after-acquired evidence rule.[110]

The Court rejected arguments that it had previously upheld back pay awards despite significant employee misconduct.[111] For example, the Court distinguished an earlier case upholding a back pay award where an employee lied under oath in an NLRB compliance hearing.[112] The Court stated that "[perjury], though serious, was not at all analogous to misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law."[113]

B. The Dissent: Denial of Back Pay Conflicts with Labor and Immigration Policy

In his dissent, Justice Breyer found that *denying* back pay would conflict with both labor and immigration policy.[114] He described back pay as the only tool in the NLRB's "remedial arsenal" that gives the NLRA any credibility.[115] Justice Breyer noted that by prohibiting the NLRB from awarding back pay, employers could flout labor laws "at least once with impunity."[116] He argued that by focusing only on the

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108. *Id.* at 149 (holding that the NLRB may not award back pay "[for] work not performed [and] for wages that could not lawfully have been earned").

109. *Id.*

110. *Id.*

111. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 145-46.

112. *Id.*

113. *Id.* at 146 (distinguishing *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317 (1994)).

114. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 153 (Breyer, J., dissenting).

115. *Id.* at 154 (Breyer, J., dissenting).

116. *Id.* Justice Breyer's criticism of the majority echoes Justice Brennan's dissent in *Sure-Tan, Inc. See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 906-13 (1984) (Brennan, J., concurring in part and dissenting in part). Justice Brennan criticized the majority's anomalous conclusion that classified the undocumented workers as "employees," yet it denied the workers back pay because they could not enter the country legally. *Id.* at 911 (Brennan, J., concurring in part and dissenting in part). In his dissenting opinion in *Hoffman Plastic Compounds, Inc.*, Justice Breyer similarly criticized the majority opinion for its internal inconsistency. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 153-54 (Breyer, J., dissenting). The inconsistency is arguably even greater in *Hoffman Plastic Compounds, Inc.*, because the illegality of the *employment relationship itself* precludes a back pay award. *Id.* at 149.

worker's misconduct, the majority overlooked the reward that a denial of back pay gives to an employer who violates labor law.[117] Justice Breyer stated that awarding back pay to Castro was consistent with immigration policy.[118] He explained that the majority would give employers an incentive to find and hire undocumented workers in violation of immigration law because these employers would be immune from liability under labor law.[119] Finally, Justice Breyer noted the inconsistency of the Court's decision in upholding a back pay award when an employee had committed perjury but denying such an award when an employee's misconduct consisted of obtaining a job by falsifying immigration documents.[120]

Hoffman Plastic Compounds, Inc. is inconsistent with labor and immigration policies and raises questions about its potential application under other worker protection statutes.[121] Specifically, whether this decision would preclude the NLRB from awarding back pay if the employer knew of the worker's immigration status at the time of hire is unclear.[122] The effect the decision will have on the protection of undocumented workers under other worker protection laws is also unclear.[123]

117. *See Hoffman Plastic Compounds, Inc.*, 535 U.S. at 160 (Breyer, J., dissenting).

118. *Id.* at 153 (Breyer, J., dissenting).

119. *See id.* at 155; *accord* NLRB v. Apollo Tire Co., 604 F.2d 1180, 1183 (9th Cir. 1979) ("Were we to hold the NLRA inapplicable to illegal aliens, employers would be encouraged to hire such persons in hopes of circumventing the labor laws.").

120. *See Hoffman Plastic Compounds, Inc.*, 535 U.S. at 157-58 (Breyer, J., dissenting) (discussing ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317 (1994)).

121. *See id.* at 153 (Breyer, J., dissenting).

122. *See* Memorandum GC 02-06 from Office of the General Counsel, NLRB, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.*, (July 19, 2002) 2002 WL 1730518, at *2 [hereinafter Memorandum GC 02-06] (recognizing the uncertainty of whether the Court's ruling prohibits back pay to a discriminatee of an employer who knowingly hired an undocumented worker).

123. *See, e.g.*, Singh v. Jutla, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002) (declining to extend *Hoffman Plastic Compounds, Inc.* to suits brought under the FLSA).

III. WHETHER *HOFFMAN PLASTIC COMPOUNDS, INC.* APPLIES TO KNOWING EMPLOYERS[124]

In determining that the NLRB could not grant back pay to Castro, the Court relied in part on the rationale that back pay would reward his IRCA violation.[125] The Court reasoned that the employee's misconduct in obtaining a job by falsifying documents in violation of the IRCA justified the total denial of back pay.[126] Conversely, in *McKennon*, the employee's act of copying confidential records limited, rather than eliminated, the back pay award because the Court balanced the employer's interest against the competing objective of deterring employment discrimination.[127] Although the Court in *Hoffman Plastic Compounds, Inc.* did not limit its holding to cases involving only unknowing employers,[128] whether back pay would also be unavailable where a knowing employer had violated the NLRA by unlawfully discharging an undocumented employee is unclear.[129]

In his dissent, Justice Breyer concluded that the majority opinion did not extend to cases involving an employer who had hired an undocumented worker with knowledge of the worker's undocumented status.[130] Although the majority did not expressly so limit its holding, the importance that the majority placed on the relative culpability of the parties with respect to IRCA violations supports this inference.[131] The majority's reasoning suggests that if

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124. An employer who knowingly hires an undocumented worker is referred to as a "knowing employer" in this Comment.

125. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 149 (holding that the NLRB does not have the authority to award back pay to a worker who violated the IRCA).

126. *Id.*

127. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361 (1995).

128. *See Hoffman Plastic Compounds, Inc.*, 535 U.S. at 149 ("[A]warding back pay to illegal aliens runs counter to policies underlying the IRCA . . . .").

129. *See* Memorandum GC 02-06, *supra* note 122, at *2.

130. *See Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-56 (Breyer, J., dissenting) ("Were the Board forbidden to assess back pay against a *knowing* employer—a circumstance not before us today . . . this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious . . . .").

131. *Id.* at 149 ("What matters here, and what sinks both of the Board's claims, is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents.").

an employee's IRCA violation precluded any recovery under the NLRA, an employer's IRCA violation should similarly impose full liability when the employer violates labor law.[132] Therefore, the answer to the question of whether *Hoffman Plastic Compounds, Inc.* applies to knowing employers may turn on the relative importance of the employee's culpability in the Court's decision.[133]

Congress intended IRCA sanctions to work in tandem with labor law protections.[134] Immunizing knowing employers from labor law liability is thus contrary to both labor and immigration policy because IRCA sanctions alone may not be sufficient to counteract the economic incentive that such immunity would give employers to knowingly hire and exploit undocumented workers.[135] If *Hoffman Plastic Compounds, Inc.* does not prohibit back pay awards to the unlawfully discharged undocumented workers of these knowing employers, the NLRB arguably has the authority in these cases to award back pay.[136] The NLRB took that approach in *A.P.R.A. Fuel Oil Buyers, Inc.*[137]

IV. WHETHER *HOFFMAN PLASTIC COMPOUNDS, INC.* APPLIES TO OTHER WORKER PROTECTION LAWS

A. The FLSA

The FLSA[138] requires that employers pay employees a minimum wage[139] and one-and-a-half times the employee's regular hourly rate

132. *See id.* at 155-56 (Breyer, J., dissenting).

133. *Id.* at 149 (holding that the NLRB may not award back pay to a worker who obtained his job "in the first instance" by violating the IRCA).

134. *See supra* note 61 and accompanying text.

135. *See* Dunne, *supra* note 3, at 645-46 (discussing the failure of IRCA sanctions to effectively deter the employment of undocumented workers).

136. *See* A.P.R.A. Fuel Oil Buyers, Inc., 320 N.L.R.B. 408, 416 (1995), *enforced*, NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 52 (2d Cir. 1997). Although the NLRB General Counsel agreed that *A.P.R.A. v. NLRB* could be valid, he did not find sufficient support in *Hoffman Plastic Compounds, Inc.* to direct regional directors to issue complaints in cases involving undocumented workers, irrespective of the employer's knowledge of the discriminatee's status. *See* Memorandum GC 02-06, *supra* note 122, at *3.

137. A.P.R.A. Fuel Oil Buyers, Inc., 320 N.L.R.B. 408, 416-17 (1995).

138. 29 U.S.C. §§ 201 to 219 (2000).

139. *Id.* § 206.

for hours in excess of 40 per week.[140] Congress intended FLSA remedies to deter violations as well as to compensate employees for underpaid work and consequently, depending on the violation involved, provide both "liquidated damages"[141] and criminal penalties.[142] In contrast, Congress intended NLRA remedies to redress the employee's harm, rather than to deter employer misconduct.[143] Consequently, the NLRB may not award punitive damages for an NLRA violation.[144] Further, FLSA damages compensate workers for work they may have already performed.[145] Conversely, the NLRA back pay puts the worker in the financial position in which he would have been but for the unlawful discharge, thus paying him for work that he did not actually perform.[146]

The Supreme Court has never addressed whether the FLSA applies to undocumented workers.[147] The Eleventh Circuit Court of Appeals considered this issue in 1988, two years after the IRCA's passage, in *Patel v. Quality Inn South*.[148] In *Patel*, an undocumented worker sued his employer for violating the FLSA minimum wage and overtime provisions, as well as for unpaid wages, liquidated damages, and attorneys' fees.[149] The court began its analysis by determining that undocumented workers were "employees" within the FLSA's meaning.[150] The court noted that the FLSA defined "employee" broadly.[151] It looked to the FLSA's specific "employee" exceptions and determined that the absence of a specific exclusion implied that

140. *Id.* § 207(a)(1).

141. *Id.* § 216(b).

142. *Id.* § 216(a). *See generally* THE FAIR LABOR STANDARDS ACT 993-1138 (Ellen C. Kearns et al. eds., 1999).

143. Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940); *see also* Weiler, *supra* note 18, at 1789 & n.69 ("[P]revention can only be the serendipitous by-product of remedies designed to redress injuries inflicted on employees.").

144. *Republic Steel Corp.*, 311 U.S. at 11-12.

145. *See* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1122 n.7 (7th Cir. 1992).

146. *See* Weiler, *supra* note 18, at 1789.

147. Patel v. Quality Inn S., 846 F.2d 700, 702 (11th Cir. 1988).

148. *Id.*

149. *Id.* at 701. Violators of the FLSA must pay an amount equal to the amount of unpaid wages owed as "liquidated damages." 29 U.S.C. § 216(b) (2000).

150. *Patel*, 846 F.2d at 702-03.

151. *Id.* at 702 (noting that "[i]t would be difficult to draft a more expansive definition" of employee).

the statute included undocumented workers as "employees."[152] The court supported this determination by relying on the Supreme Court's analysis of "employee" under the NLRA in *Sure-Tan, Inc.*, noting that this reliance was appropriate because the FLSA and the NLRA "similarly define the term 'employee.'"[153]

The court then considered the IRCA's effect on undocumented workers' rights under the FLSA and determined that "coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it."[154] Using reasoning very similar to that which Justice Breyer later used in his dissenting opinion in *Hoffman Plastic Compounds, Inc.*, the court noted that Congress intended the IRCA to deter the employment of undocumented workers and that "[i]f the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them."[155] The court quoted the House Education and Labor Committee, which said that it did "not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . *Wage and Hour Division of the Department of Labor.*"[156] The court also supported its argument that the IRCA and the FLSA did not conflict by referring to an IRCA provision that appropriated funds for FLSA enforcement by the Department of Labor.[157]

Then, the court distinguished the remedies available under the FLSA and under the NLRA.[158] The court noted that although courts appropriately refer to the NLRA when interpreting an employer's liability under the FLSA, courts should not do so when considering remedies.[159] Under the NLRA, the NLRB remedies unlawful discharges by providing back pay, which merely puts the worker in the financial position in which he would have been absent the NLRA

152. *Id.* at 702 & n.2.
153. *Patel*, 846 F.2d at 703.
154. *Id.* at 704.
155. *Id.*
156. *Id.* (quoting H.R. REP. NO. 99-682, pt. 2, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758 (alteration in original)).
157. *Id.* at 704 (citing Pub. L. No. 99-603, § 111(d), 100 Stat. 3357, 3381 (1986)).
158. *Id.* at 705.
159. *Patel*, 846 F.2d at 705.

violation.[160] Thus, in *Sure-Tan, Inc.*, the Supreme Court considered the legality of the workers' presence during the back pay period because they had left the country, and back pay would have compensated them for work not performed during a period that they were not legally present.[161] Conversely, the worker in *Patel* sought "to recover unpaid minimum wages and overtime for work *already performed*."[162] Therefore, the employer's reliance on *Sure-Tan, Inc.* was misplaced when determining the availability of remedies under the FLSA.[163]

Courts that have considered whether the FLSA protects undocumented workers have typically analyzed the issue by relying on *Patel*: similarly analogizing the inclusion of undocumented workers as "employees" under the NLRA but distinguishing the Acts on the basis of their remedial schemes.[164] These courts have also determined that awarding damages under the FLSA does not conflict with the IRCA because awarding damages removes an incentive that employers would otherwise have to violate the IRCA.[165]

Hoffman Plastic Compounds, Inc. is unlikely to affect the ability of undocumented workers to recover FLSA remedies for unpaid wages.[166] The United States District Court for the Northern District of California addressed whether *Hoffman Plastic Compounds, Inc.* would bar a plaintiff from recovering unpaid wages under the FLSA in August 2002, in *Singh v. Jutla*.[167] *Singh* involved an undocumented worker whose employer induced him to come to the

160. *See id.* at 705 ("Patel is not attempting to recover back pay for being unlawfully deprived of a job."). Conversely, a back pay award for an unlawful discharge under the NLRA compensates for the unlawful denial of a job. *See* Weiler, *supra* note 18, at 1789 (describing back pay from an employer's viewpoint as payment for "services it has not received").

161. *Patel*, 846 F.2d at 705 ("On the issue of back pay the Court was faced with the question of whether the deported employees could recover for the loss of their jobs.").

162. *Id.* at 705.

163. *See id.* at 706.

164. *E.g.*, Singh v. Jutla, 214 F. Supp. 2d 1056, 1058-62 (N.D. Cal. 2002); Flores v. Albertsons, Inc., No. CV-01-00515AHM, 2002 WL 1163623, at *17-18 (C.D. Cal. Apr. 9, 2002); Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998).

165. *Singh*, 214 F. Supp. 2d at 1061-62; *Contreras*, 25 F. Supp. 2d at 1056. Justice Breyer used this reasoning in his dissenting opinion in *Hoffman Plastic Compounds, Inc.* *See* discussion *supra* Part II.B.

166. *See Singh*, 214 F. Supp. 2d at 1060.

167. 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

United States by offering him work, tuition for education, and other benefits, but not wages.[168] Relying on *Patel*, the court held that the FLSA applies to undocumented workers.[169] The court then distinguished *Hoffman Plastic Compounds, Inc.*[170] The court determined that the Supreme Court's first rationale, that back pay would compensate an employee for work he could not legally do, did not apply because an employee claiming unpaid wages was seeking compensation for work that he had already completed.[171]

The court then noted that, unlike the employer in *Hoffman Plastic Compounds, Inc.*, the employer in *Singh* was a knowing employer.[172] The court determined that the Supreme Court's second rationale, that a court would contradict immigration policy by rewarding an IRCA violator with a back pay award, would not apply because the employee in *Singh* had not violated the IRCA.[173] Further, the court determined that the argument that compensation for unpaid wages would unjustly enrich an employee was unavailable in the context of a FLSA claim for unpaid wages, because the employer had already benefited from the employee's work.[174] Finally, the court noted that the Supreme Court addressed a very specific remedy in *Hoffman Plastic Compounds, Inc.*[175] The court said that the Supreme Court did not hold in *Hoffman Plastic Compounds, Inc.* that the NLRB was precluded from granting every form of relief.[176] Instead, the Supreme Court had determined that *back pay* was an unavailable remedy and stressed that the employer was liable for his labor law misconduct.[177] Thus, the court in *Singh* held that undocumented workers were entitled to legal remedies for unpaid wages under the FLSA.[178]

168. *Id.* at 1057.
169. *Id.* at 1058.
170. *Id.* at 1060-61.
171. *Id.* at 1060.
172. *Id.* at 1061.
173. *Singh*, 214 F. Supp. 2d at 1062.
174. *Id.* at 1061.
175. *Id.*
176. *Id.* at 1061 & n.3.
177. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002) (noting that a "[l]ack of authority to award back pay" does not eliminate liability of an employer).
178. *See Singh*, 214 F. Supp. 2d at 1062.

The Supreme Court's denial of any meaningful award in *Hoffman Plastic Compounds, Inc.* was merely a function of the lack of other effective awards available to remedy a violation of NLRA section 8(a)(3).[179] However, courts have more flexibility in fashioning relief under the FLSA than the NLRB does under the NLRA.[180] For example, where an employer discharges an employee in retaliation for his assertion of rights under the FLSA, a court has the option of awarding "front pay" if reinstatement is not possible.[181]

In the first year following the Supreme Court's ruling, several lower courts have addressed whether *Hoffman Plastic Compounds, Inc.* precludes damages under the FLSA, and they have followed the reasoning that the United States District Court for the Northern District of California used in *Singh* and that the Eleventh Circuit Court of Appeals used in *Patel.*[182] These courts have distinguished *Hoffman Plastic Compounds, Inc.* on the basis of the different nature of remedies available under the NLRA and under the FLSA.[183] The Department of Labor, the federal agency authorized to enforce the FLSA,[184] agrees with these courts that *Hoffman Plastic Compounds, Inc.* does not affect FLSA protection for undocumented workers.[185]

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179. *See Hoffman Plastic Compounds, Inc.*, 535 U.S. at 154 (Breyer, J., dissenting) ("Without the possibility of the deterrence that back pay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal.").

180. *Compare* Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219, 1231 (7th Cir. 1995) (holding that a victim of a FLSA retaliation is "expressly entitled to all legal and equitable relief that may be appropriate"), *with* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904-05 (1984) (holding that awards under the NLRA must be tied to the employee's actual economic losses).

181. *Compare* Mitchell v. Dyess, 180 F. Supp. 852, 854 (S.D. Ala. 1960) (awarding a monetary award not tied to actual loss in a FLSA claim), *with Sure-Tan, Inc.*, 467 U.S. at 904-05 (holding that awards under the NLRA must be tied to the employee's actual economic losses).

182. *See, e.g.*, Cortez v. Medina's Landscaping, 2002 LEXIS 18831 (N.D. Ill. Sept. 30, 2002); Singh v. Jutla, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002); Flores v. Albertsons, Inc., 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. Apr. 9, 2002).

183. *Compare* Patel v. Quality Inn S., 846 F.2d 700, 705 (11th Cir. 1988) ("Patel is not attempting to recover back pay for being unlawfully deprived of a job."), *with* Weiler, *supra* note 18, at 1789 (describing back pay from the employers' viewpoint as payment for "services it has not received").

184. 29 U.S.C. § 204 (2000).

185. *See* Department of Labor, *Fact Sheet No. 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of* Hoffman Plastics *Decision on Laws Enforced by the Wage and Hour Division, at* http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm (last visited May 26, 2003).

Thus, *Hoffman Plastic Compounds, Inc.* will probably not affect the availability of FLSA remedies to undocumented workers.[186]

B. Title VII

Title VII[187] prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin."[188] Courts have very wide discretion in fashioning relief under Title VII.[189] A court may order equitable or monetary relief that places the parties in the position that they would have occupied absent the violation of the Act or order such "affirmative action as may be appropriate."[190] Relief may include back pay for the period after an unlawful discharge[191] or monetary damages where instatement or reinstatement is not feasible.[192] Finally, the Civil Rights Act of 1991[193] allows a court to award punitive monetary damages under Title VII in certain circumstances.[194]

Courts have typically analyzed the availability of back pay to undocumented workers under Title VII by looking at decisions made in the context of the NLRA because of the similarity of the Acts'

186. *See, e.g., Singh*, 214 F. Supp. 2d at 1060 (holding that *Hoffman Plastic Compounds, Inc.* does not preclude a legal remedy under the FLSA); *Zeng Liu*, 207 F. Supp. 2d at 192 (declining to extend *Hoffman Plastic Compounds, Inc.* where plaintiff brings suit for unpaid wages under the FLSA); *Flores*, 2002 WL 1163623, at *18-19.

187. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

188. *Id.* § 2000e-2(a)(1) (2000).

189. *See id.* § 2000e-5(g)(1); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) ("[L]ike all other remedies under the Act, [back pay] is one which the courts 'may' invoke.").

190. *See* 42 U.S.C. § 2000e-5(g)(1); *Albemarle Paper Co.*, 422 U.S. at 419 (noting that remedies under Title VII are remedial in nature).

191. 42 U.S.C. § 2000e-5(g)(1); *see also Albemarle Paper Co.*, 422 U.S. at 421 (reasoning that courts should ordinarily award back pay to effectuate the remedial purposes of the Act).

192. *See* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 1202 (4th ed. 1997); *see also* Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 954-55 (1st Cir. 1995) (upholding an award of front pay where employee had a small chance of reemployment at a similar salary); King v. Staley, 849 F.2d 1143, 1145 (8th Cir. 1988) (holding that although discretionary, a court shall award a victim of racial discrimination back pay and front pay if necessary to make the discriminatee whole).

193. 42 U.S.C. § 1981a (2000).

194. *Id.* § 1981a(a)(1). The complaining party may only recover punitive damages if the defendant acted with "malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.* § 1981a(b)(1).

remedial schemes.[195] However, courts have considerably more discretion in fashioning remedies under Title VII than under the NLRA.[196]

The few courts that have addressed the issue of whether undocumented workers can sustain a claim under Title VII after the IRCA's passage have reached inconsistent results.[197] In *EEOC v. Tortilleria "La Mejor,"*[198] the United States District Court for the Eastern District of California, the first court to address this issue, began by analyzing whether undocumented workers were "employees" within the Act's meaning.[199] The court determined that because Title VII specifically exempted workers employed outside the United States, it implicitly included those employed within the United States.[200] The court then turned to the question of whether the IRCA affected the undocumented workers' rights under Title VII.[201] The court determined that Title VII uniformly applied to undocumented and legal workers alike because if it did not, employers would have an economic incentive to hire undocumented workers in violation of the IRCA.[202]

In *Egbuna v. Time-Life Libraries, Inc.*,[203] the Fourth Circuit Court of Appeals addressed the issue in the context of a claim of retaliatory

195. *See Albemarle Paper*, 422 U.S. at 419 (noting that Congress modeled the back pay provision of Title VII on the NLRA); *see also* EEOC v. Tortilleria "La Mejor," 758 F. Supp. 585, 590 (E.D. Cal. 1991) ("[C]ourts frequently are guided by principles developed under the NLRA in construing Title VII.").

196. *See Albemarle Paper Co.*, 422 U.S. at 419 n.11 (noting the distinction between the mandatory language concerning back pay in the NLRA and the permissive language used in Title VII). The remedies available under the two acts are less similar than they were when the Court decided *Albemarle Paper*, due to the passage of the Civil Rights Act of 1991, 42 U.S.C. § 1981a (2000), which provides for punitive damages for certain violations of Title VII. 42 U.S.C. § 1981a(b)(1).

197. *Compare* EEOC v. Tortilleria "La Mejor," 758 F. Supp. 585, 587 (E.D. Cal. 1991), *with* Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 186 (4th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999).

198. 758 F. Supp. 585, 587 (E.D. Cal. 1991) (noting that no court had previously addressed whether undocumented workers are "employees" within the meaning of Title VII).

199. *Id.*

200. *Id.* at 589-90.

201. *Id.* at 590.

202. *Id.* at 590-91. The court relied upon the Eleventh Circuit's reasoning in *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), and the legislative history of the IRCA in making this determination. *Id.*

203. 153 F.3d 184 (4th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999).

discrimination.[204] In *Egbuna*, Time-Life Libraries hired Obiora Egbuna, a Nigerian citizen with a valid work visa, but refused to rehire him after he resigned.[205] Mr. Egbuna claimed that the company refused to rehire him in retaliation for having corroborated testimony in a co-worker's sexual discrimination suit during his previous employment.[206] He claimed that the company had violated the anti-retaliation provision of Title VII.[207] Time-Life Libraries was not aware that Mr. Egbuna's work visa had expired and that he was no longer legally authorized to work when it refused to rehire him.[208]

The Fourth Circuit Court of Appeals began its analysis by stating that a Title VII claimant must first show that he was qualified for employment.[209] The court concluded that undocumented workers are not entitled to protection under Title VII because the IRCA prohibits their employment.[210]

The dissent criticized the majority opinion for ignoring the employer's motive, an issue that the Supreme Court in *McKennon* had held relevant to the determination of an employer's liability, irrespective of the employee's qualification to work.[211] The dissent said that the employee's qualifications to work were relevant only to the issue of remedies, not liability, which should turn on the employer's discriminatory motive.[212] Additionally, the dissent argued that by immunizing employers who violate the IRCA from liability under Title VII, the majority undermined the IRCA's purpose in deterring illegal immigration by giving such employers an economic incentive to hire undocumented workers.[213] The dissent noted that relieving employers of their obligations under Title VII with respect

204. *Egbuna*, 153 F.3d at 185-86.

205. *Id.*

206. *Id.* at 186.

207. *Id.* Title VII prohibits discrimination against an employee on the basis of having "participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

208. *Egbuna*, 153 F.3d at 188 (Ervin, J., dissenting).

209. *Id.* at 184.

210. *Id.*

211. *Id.* at 188-89 (Ervin, J., dissenting) ("The Court's decision was based on the value of effectuating the purpose of the ADEA: 'the elimination of discrimination in the workplace.'") (quoting McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995)).

212. *Id.* at 189 (Ervin, J., dissenting).

213. *Id.*

to undocumented workers may "reach[] beyond" Title VII, and nullify undocumented workers' rights under other federal laws,[214] such as the Americans with Disabilities Act[215] and the Age Discrimination in Employment Act of 1967.[216]

The difference between the Fourth Circuit Court of Appeal's opinion in *Egbuna* and the Supreme Court's opinion in *Hoffman Plastic Compounds, Inc.* bears on the availability of Title VII protection to undocumented workers. In *Egbuna*, the Fourth Circuit Court of Appeals conflated the issues of liability and remedy and determined that undocumented workers were not "employees" within Title VII's meaning.[217] Conversely, the Supreme Court in *Hoffman Plastic Compounds, Inc.* held that undocumented workers were entitled to some of the protections of the NLRA but could not receive the very specific remedy of back pay.[218]

Hoffman Plastic Compounds, Inc. is unlikely to affect the availability of back pay under Title VII for two reasons. First, Congress intended Title VII's remedial scheme primarily to deter employment discrimination rather than to compensate harmed employees.[219] Conversely, eliminating discrimination on the basis of union support is a secondary goal of the NLRA that effectuates the Act's primary goal of protecting workers' rights to join unions and engage in collective bargaining.[220] Thus, back pay may be available under Title VII because the prohibition of discriminatory discharge is more central to Title VII than to the NLRA and may therefore

214. *Egbuna*, 153 F.3d at 189.

215. 42 U.S.C. §§ 12101 to 12213 (2000).

216. 29 U.S.C. §§ 621 to 634 (2000).

217. *See Egbuna*, 153 F.3d at 187.

218. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002).

219. *Compare* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) ("Congress designed the remedial measures in [the ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers to 'self-examine and to self-evaluate their employment practices and to endeavor to eliminate . . . discrimination.'") (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)), *with* Weiler, *supra* note 18, at 1789 (describing back pay from the employers' viewpoint as payment for "services it has not received").

220. *Compare* The National Labor Relations Act, 29 U.S.C. § 151 (2000) (stating that the purpose of the Act is to "encourag[e] the practice and procedure of collective bargaining"), *with* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (stating that the purpose of Title VII is to eliminate racially discriminatory practices in employment).

outweigh the competing consideration that awarding back pay to an IRCA violator rewards his misconduct.[221] A court may thus compensate a discriminatee by balancing the employee's misconduct against Title VII's public purpose of eliminating employment discrimination, as the Supreme Court did in *McKennon*.[222]

Second, *Hoffman Plastic Compounds, Inc.* only precludes undocumented workers from receiving the specific remedy of back pay.[223] Therefore, Title VII's wider array of remedial options are probably still available to undocumented workers.[224] Front pay, for example, would be an appropriate remedy under Title VII if reinstatement would violate the IRCA's prohibition of the employment of undocumented workers.[225]

V. THE IMPACT OF THE COURT'S DECISION IN *HOFFMAN PLASTIC COMPOUNDS, INC.*

The United States workforce currently includes millions of undocumented workers.[226] These workers often lack practical access to the federal laws that protect them because fear of retaliation inhibits them from asserting their rights.[227] Undocumented workers typically earn far less than federal law requires employers to pay them, and the Department of Labor lacks the resources to effectively enforce the FLSA's requirements.[228] Thus, exploitation often goes unchecked.[229]

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221. *See Hoffman Plastic Compounds, Inc.*, 535 U.S. at 149.

222. *See McKennon*, 513 U.S. at 363.

223. Singh v. Jutla, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002).

224. *See id.* ("*Hoffman* . . . precludes illegal aliens from a very specific remedy.").

225. *See* Pollard v. E.I. duPont de Nemours & Co., 532 U.S. 843, 853 (2001) (holding that Title VII authorizes "front pay" as a remedy where reinstatement is not appropriate).

226. *See supra* note 2.

227. *See* Dunne, *supra* note 3, at 628-29; *see also* Hudson & Schenck, *supra* note 4, at 356 (stating that undocumented workers' fear of deportation makes reporting employers' illegal behavior unlikely). This Comment does not address the reluctance of undocumented workers to assert their legal rights out of justifiable fear of deportation. For an analysis of the inconsistency between labor and immigration law, see Hudson & Schenck, *supra* note 4.

228. *See* Dunne, *supra* note 3, at 633, 647.

229. *Id.* at 637.

Early reports indicate that the Supreme Court's decision in *Hoffman Plastic Compounds, Inc.* may have worsened these workers' plight and encouraged employers to test the decision's limits.[230] Even if courts interpret *Hoffman Plastic Compounds, Inc.* narrowly, as only precluding back pay where an unknowing employer hired an undocumented worker and later illegally discharged him for his union activity, the decision may impair the legal rights of both legally authorized and undocumented workers.[231] *Hoffman Plastic Compounds, Inc.* may give employers an incentive to hire such workers because they are exploitable, and it may encourage exploitation by lowering its cost.[232]

Further, legally authorized workers may have much more difficulty accessing their legal right to choose union representation.[233] Employees without significant protection from unlawful discharge on the basis of their union activity are not likely to elect union representation because they do not have a "comparable stake in the collective goals of their legally resident co-workers."[234] Additionally, the presence of workers who cannot assert their rights under the NLRA because they justifiably fear discharge may damage the

230. *See* Nancy Cleeland, *Employers Test Ruling on Immigrants; Labor: Some Firms Are Trying to Use Supreme Court Decision As Basis for Avoiding Claims Over Workplace Violations*, L.A. TIMES, Apr. 22, 2002, (Business), at C1, *available at* 2002 WL 2470232; *see also* L.M. Sixel, *Damage Awards for Illegal Immigrants at Issue*, HOUSTON CHRON., June 28, 2002, (Business) at 1, *available at* 2002 WL 23205352; Alfredo Corchado & Lys Mendez, *Undocumented Workers Feel Boxed In They Say Have No Rights to Damages from Labor Abuses*, DALLAS MORNING NEWS, July 14, 2002, at 1J.

231. *See Statement by John J. Sweeney on U.S. Supreme Court Decision on Undocumented Workers' Rights on Back Pay* (Mar. 27, 2002), *at* http://www.aflcio.org/mediacenter/prsptm/pr03272002.cfm.

232. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 156 (2002) (Breyer, J., dissenting) ("[E]ven if limited to cases where the employer did not know of the employee's status, the incentive may prove significant—for, as the Board has told us, the Court's rule offers employers immunity in borderline cases, thereby encouraging them to take risks . . . .").

233. *See* David G. Savage & Nancy Cleeland, *High Court Ruling Hurts Union Goals of Immigrants; Labor: An Employer Can Fire an Illegal Worker Trying to Organize, the Justices Decide. Exploitation is Feared.*, L.A. TIMES, Mar. 28, 2002, (The Nation) at A20 (stating that labor organizers fear that *Hoffman Plastic Compounds, Inc.* will make it "more difficult to convince undocumented workers . . . to support a union campaign").

234. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984).

solidarity required for effective collective bargaining in workplaces already represented by a union.[235]

Lower courts have not extended the holding of *Hoffman Plastic Compounds, Inc.* to cases brought under the FLSA.[236] A FLSA claim for unpaid wages is distinguishable from a NLRA charge for discriminatory discharge because the FLSA claim for underpaid wages seeks compensation for work already performed.[237] Even where a FLSA claimant seeks a remedy for retaliatory discharge, courts have a greater variety of remedial options than the NLRB does when remedying an unlawful discharge violation and may award punitive damages in certain circumstances.[238] Although employers have argued that *Hoffman Plastic Compounds, Inc.* extends to FLSA cases, it appears unlikely that this argument will succeed.[239]

Courts are more likely to extend *Hoffman Plastic Compounds, Inc.* to cases brought under Title VII because the NLRA and Title VII similarly compensate the unlawfully discharged employee for work that he did not actually perform.[240] However, the Supreme Court stressed that the NLRA still protected undocumented workers in *Hoffman Plastic Compounds, Inc.* and that the Supreme Court was only prohibiting a particular remedy: back pay.[241] Thus, the wider array of remedial measures that courts can grant under Title VII would arguably still be available to undocumented workers, even after *Hoffman Plastic Compounds, Inc.*[242]

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235. *See id.* at 892 (discussing the damage to effective collective bargaining if a "subclass of workers without a comparable stake in the collective bargaining goals of their legally resident co-workers" were to comprise part of the collective bargaining unit).

236. *See* discussion *supra* Part IV.A.

237. *See* discussion *supra* Part IV.A.

238. *See* discussion *supra* Part IV.A.

239. *See* discussion *supra* Part IV.A.

240. *See* discussion *supra* Part IV.B.

241. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002) ("Lack of authority to award back pay does not mean that the employer gets off scot-free.").

242. *See* discussion *supra* Part IV.B. Defendants have argued that the Supreme Court's decision in *Hoffman Plastic Compounds, Inc.* does not allow undocumented workers any relief under a variety of laws not discussed in this Comment. *See, e.g.*, Martinez v. Mecca Farms, Inc., 213 F.R.D. 601 (S.D. Fla. 2002) (the Migrant and Seasonal Agricultural Worker Protection Act); Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003) (workers' compensation benefits); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003) (same); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816 (N.Y. App. Div. 2003) (negligence).

CONCLUSION

Even if courts interpret *Hoffman Plastic Compounds, Inc.* narrowly, the decision effectively rewards employers who hire workers that they suspect have falsified documents by allowing these employers to flout NLRA protections without sanction.[243] By allowing employers such an easy way to violate labor laws, the decision undermines the ability of legally authorized workers to form labor unions and collectively bargain.[244] The decision encourages the exploitation of the most vulnerable members of society and undermines the rights of legally authorized workers as well.[245]

Courts should distinguish *Hoffman Plastic Compounds, Inc.* in cases that involve federal worker protection statutes other than the NLRA because disparate application of these laws would similarly encourage employers to hire and exploit undocumented workers.[246] A workplace culture that tolerates employment discrimination, or the payment of substandard wages with respect to one subset of workers, may negatively impact other workers as well.[247]

Additionally, courts that expand the holding of *Hoffman Plastic Compounds, Inc.* to preclude back pay in the case of a knowing employer would frustrate immigration policy by rewarding employers who violate the IRCA with labor law immunity.[248] The NLRB should award back pay that terminates either upon the employee's reinstatement (if the employee successfully obtains a green card) or after a reasonable time (if the employee has difficulty obtaining a green card).[249] This policy is consistent with both the NLRA and the IRCA because it uniformly imposes labor law liability on employers who knowingly hire undocumented workers, while not

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243. *Hoffman Plastic Compounds, Inc.*, 533 U.S. at 156 (Breyer, J., dissenting). Undocumented workers commonly obtain employment by using counterfeit documents. Dunne, *supra* note 3, at 644.

244. *See* discussion *supra* Part V.

245. *See* discussion *supra* Part V.

246. *See* discussion *supra* Part V.

247. *See* discussion *supra* Part V.

248. *See* discussion *supra* Part II.

249. This was the NLRB's approach in *A.P.R.A. Fuel Oil Buyer's Group*. *See* discussion *supra* Part I.F.

requiring these employers to reinstate unlawfully discharged employees who cannot obtain authorization to work.[250] Such a policy would respect current immigration policy while limiting the damaging potential of the Supreme Court's decision in *Hoffman Plastic Compounds, Inc.*[251]

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250. *See* discussion *supra* Part I.F. The NLRB has determined not to follow this course. *See* Memorandum GC 02-06, *supra* note 122, at *1.

251. *See* discussion *supra* Part I.F.